No. 88-189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BELL ATLANTIC,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES *

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* A current listing required by Supreme Court Rule 28.1 appears on page iii of Bell Atlantic's Petition for a Writ of Certiorari.

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This case deserves the Court's attention because it raises a fundamental question as to the jurisdiction of federal courts over cases that have been rendered moot by administrative actions. Over a vigorous dissent by Judge Starr, a panel of the Court of Appeals for the District of Columbia Circuit exerted jurisdiction over this case, even though the dispute before the court had been fully resolved by an intervening order of the Federal Communications Commission ("FCC"). In doing so, the panel majority improperly departed from Supreme Court and other federal court precedent.

The decisions of the majority panel and the District Court below, if allowed to stand, would have a profound effect on the pricing of telecommunications services in

this country. The Court of Appeals itself was troubled by the potential impact of the District Court's ruling and sought to cure the defect by interpreting that decision to be limited to the precise facts presented to the District Court. (Pet. at 8, 17.) As Respondents the United States and American Telephone and Telegraph Company ("AT&T") themselves acknowledge, however, the District Court's decision has far broader ramifications. (Mem. of United States at 8-9; Opp. of AT&T at 4-5.) Its interpretation of the Modification of Final Judgment ("MFJ") could be, and is being, cited by Respondents as having established a new and sweeping precedent that could be used to constrain pricing decisions of the former Bell operating companies in a multitude of areas unrelated to the facts of this case. This interpretation vests in the District Court an extraordinary authority over the country's telephone rates, even though the Respondents, as parties to the MFJ, originally represented to this Court that the decree was not intended to interfere with the normal supervision of telephone rates exercised by the FCC and state regulators. (Pet. at 3, 17.)

In papers filed with this Court, the United States and AT&T now offer a variety of theories why the Court of Appeals was entitled to retain jurisdiction to review the District Court's order. None of these theories presents a cogent ground for departing from this Court's established mootness doctrines in the context of this case.

1. Both the United States and AT&T cloak their defense of the Court of Appeals' jurisdiction in the special character of the MFJ. The United States claims that to apply traditional mootness principles to this case "amounts to an attack on the authority of district courts to enforce antitrust decrees with respect to conduct that is also subject to regulatory jurisdiction." (Mem. of United States at 8.) AT&T suggests that Bell Atlantic cannot challenge the jurisdiction of the lower court in

this case without also bringing into question the substantive provisions of the MFJ. (Opp. of AT&T at 5.) These arguments misunderstand the nature of consent decrees and the limited power of the federal judiciary.

In terms of federal court jurisdiction, a consent decree is no different than a statute, a regulation, a contract, or any other body of law. The federal courts have authority to interpret such legal sources only in the context of live cases and controversies. Just as a federal court cannot render advisory opinions with respect to an act of Congress, an Article III tribunal cannot offer interpretations of a consent decree based on hypothetical or speculative facts.

Petitioner has not, and does not, contend that the District Court lacked jurisdiction over AT&T's emergency motion at the time it was filed. There was then an unresolved question whether U S West could impose different access charges depending on the type of switching equipment that the GSA selected. The District Court was thus empowered to resolve that question through interpretation of the MFJ.

Once the FCC issued an intervening final administrative order resolving the same issue, however, the controversy dissolved for Article III purposes. Because the case was still pending on appeal, the Court of Appeals should have vacated the District Court's order as moot.[1]

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[1] The same erroneous analysis taints the United States' effort to distinguish this case from the Fifth Circuit's decision in *Western Electric Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203, *reh'g denied per curiam*, 573 F.2d 255, *cert. denied*, 439 U.S. 895 (1978). The United States claims that *Milgo* is distinguishable because that case involved a claimed violation of the antitrust laws while this case concerns an alleged violation of an antitrust consent decree. (Mem. of United States at 8 n.5.) Such a distinction makes absolutely no difference, and inexplicably elevates consent decrees above other sources of law.

Likewise ill considered is Respondents' suggestion that the Court of Appeals retained jurisdiction to interpret the MFJ because only one of nine parties argued that the case was moot. (Opp. of AT&T at 5; Mem. of United States at 5-6.) It is elemental that the consent of litigants cannot vest a federal court with jurisdiction that is otherwise lacking. Indeed, this Court regularly dismisses cases as moot even when the parties involved unanimously agree that their lawsuits remain justiciable.[2] Respondents offer no logical reason why this rule should not also apply when federal courts are called upon to interpret consent decrees such as the MFJ.

2. The United States is also wrong to suggest that the declaratory nature of the FCC's order diminishes its impact on the justiciability of this case. (Mem. of United States at 9.) This Court has long recognized that "declaratory relief alone has virtually the same practical impact as a formal injunction."[3] Consistent with this view, the lower federal courts on numerous occasions have dismissed cases as moot because of intervening administrative actions that were declaratory in nature.[4] To our knowledge, neither this Court nor any other federal court (aside from the Court of Appeals majority panel in this case) has suggested that administrative actions should not be allowed to moot judicial proceedings.

Indeed, this Court has decided that a judicial proceeding can be mooted by far less. In *Iron Arrow Honor Society* v. *Heckler*,[5] the Court ruled that a new univer-

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[2] *See, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979); *id.* at 637 (Powell, J., dissenting); *DeFunis* v. *Odegaard*, 416 U.S. 312, 315 (1974) (*per curiam*).

[3] *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971).

[4] *See* cases cited in Pet. at 12-13, 15-17.

[5] 464 U.S. 67 (1983) (*per curiam*).

sity policy prohibiting a campus honor society from conducting initiation ceremonies on university property was sufficient to moot a lawsuit brought by the society against the federal government. If a university's unilateral declaration on such an issue could moot a controversy for Article III purposes, there is no conceivable reason why a declaratory ruling by an agency of the federal government should not have precisely the same effect.

The United States further mischaracterizes the FCC's action as "tentative" with respect to Bell Atlantic and other former Bell operating companies. Petitioner invites the Court to review the full text of the FCC's decision in this matter. (Pet. App. at 37a-51a.) Nowhere in that decision does the FCC suggest that its action would have anything less than binding effect on Bell Atlantic or similarly situated entities. Indeed, the word "tentative" does not even appear in that order.[6] Clearly, the FCC's ruling has the force of law and must be accorded full deference in determining whether the federal courts retain jurisdiction over this litigation.

3. In a further effort to breathe justiciability back into this case, the United States and AT&T argue that the case is not moot because AT&T might use the District Court's interpretation of the MFJ to prevent the former Bell operating companies from engaging in future "discriminatory" practices in situations other than those considered by the District Court. (Mem. of United States at 8-9; Opp. of AT&T at 4-5.)

These assertions undercut the claims of the United States and AT&T that this case is "fact-bound" and unimportant. In any event, though, these assertions as to the broad impact of the District Court's ruling have no bearing on the issue presented in Bell Atlantic's petition.

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[6] Bell Atlantic has previously explained why the possibility of subsequent FCC rulemaking should not affect the Court's analysis of the justiciability of this case. (Pet. at 14.)

The mere fact that the lower courts' decisions would have precedential value to AT&T does not mean that this case remains live for Article III purposes. Indeed, if this were not the case, few lawsuits would ever become moot because the prevailing party would always be able to speculate as to some hypothetical new controversy for which a favorable ruling would be helpful.

The proper test of justiciability—and the one Judge Starr urged on the majority panel in the Court of Appeals—turns on whether the actual controversy which brought the parties to court in the first place remains live. Here, the sole issue properly presented to the District Court for interpretation under the MFJ was whether or not U S West could discriminate in access charges for GSA switching systems.[7] Once the FCC definitively resolved this matter, the case was rendered moot regardless of whether this consequence may deprive AT&T of a useful precedent.

4. Respondents also argue that the justiciability of this case is preserved because the Justice Department is still considering whether to bring an enforcement action against U S West for violating the MFJ with respect to its provision of switching services to the GSA. The Department has been aware of this matter for more than two years without taking any enforcement action. Even if some enforcement action were imminent, however, this point would be irrelevant.

In previous mootness cases, this Court has not considered collateral enforcement actions as sufficient grounds

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[7] As explained in Judge Starr's dissent (Pet. App. at 29a-30a), and as Respondents do not contest, the District Court never made the factual findings necessary to rule on AT&T's original motion with respect to Dial 8 lines. As Judge Starr noted, under these circumstances, the appropriate disposition would have been to remand the case for further proceedings, if necessary, before the District Court. *See Duke Power Co.* v. *Greenwood County*, 299 U.S. 259 (1936) (*per curiam*).

for retaining jurisdiction over otherwise moot cases. For example, in *Diffenderfer* v. *Central Baptist Church, Inc.*, the Court had before it a Florida tax statute that had been declared unconstitutional under the First Amendment.[8] Intervening Florida legislation had repealed the statute in question, but there remained some uncertainty whether the state might later seek back taxes from the taxpayer under the repealed law.[9] The Court nevertheless ruled the case moot on the grounds that the controversy that precipitated the case—the constitutionality of the original Florida statute—was no longer live.

The pending Justice Department investigation of U S West should be treated in the same manner in this case. In the event that the Department eventually chooses to proceed against U S West, there will be ample opportunity for the appropriate tribunal to determine whether U S West actually violated the MFJ—an issue the District Court here did not reach since its relief was solely prospective—and, if so, what form of sanctions, if any, would be appropriate. In the meantime, there is no judicially cognizable controversy over the application of the MFJ to access charges for GSA switching services.

5. Finally, Respondents argue that, even if the FCC's action did dispose of the controversy before the Court of Appeals, the case could not be moot unless Bell Atlantic meets the "heavy burden" of showing that the alleged wrongful behavior of U S West, which led to the proceedings before the District Court, could not recur. (Opp. of AT&T at 3; Mem. of United States at 7 n.2.) Here again, Respondents are wrong on the law. The cases cited by Respondents all involved defendants who voluntarily complied with adverse decisions and then claimed that those decisions were moot. In those situations, courts are understandably concerned that the defendant's action is

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[8] 404 U.S. 412 (1972) (*per curiam*).

[9] *Id.* at 415-17 (Douglas, J., dissenting).

simply a tactic to force the vacating of an adverse judgment, and so they require compelling evidence that the defendant would not repeat the conduct that led to the initiation of proceedings in the first place.

Here, however, it is the action, not of a defendant, but of an independent third party—a government agency—that has mooted the appeal. As this Court has held in *Iron Arrow*, when the action of a nondefendant moots an appeal, there is no need for any heavy burden to be carried by a party claiming mootness because this is not a situation where voluntary compliance could be a tactic to force the vacating of an adverse judgment. Indeed, when the effect of a lawsuit is overtaken by intervening actions of an independent third party, federal courts are constitutionally obliged to dismiss the case as moot whether or not any party raises the issue of justiciability.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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